

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OWEN PAUL BOWDIDGE,

Defendant-Appellant.

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UNPUBLISHED

November 14, 2000

No. 215580

Calhoun Circuit Court

LC No. 92-002650-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of sentence entered pursuant to his plea of guilty to probation violation. That conviction resulted in a sentence of 5-20 years' imprisonment. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence.

I. Factual and Procedural Background.

The facts of this case are undisputed. In 1993, defendant pleaded guilty to possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to lifetime probation.<sup>1</sup> In February, 1998, defendant pleaded guilty to violating probation by failing to report as required. Although the trial court considered revoking defendant's lifetime probation and sentencing him on the underlying drug crime, the court instead decided to impose a new condition on defendant's probation. That condition was an eight-month term of incarceration in the county jail, with work release privileges. In April, 1998, defendant failed to return to custody from work release, having fled to Georgia.

Police apprehended defendant and returned him to Michigan, where he reached a plea agreement with the prosecutor. In September, 1998, defendant pleaded guilty to violating his

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<sup>1</sup> That sentence was to run consecutively to a previous sentence of lifetime probation imposed in case #92-002653.

lifetime probation, and in a separate file, pleaded guilty to escape from a felony jail sentence, MCL 750.195(2); MSA 28.392(2). That plea agreement provided that defendant's sentences for lifetime probation, in both the instant case and in case #92-002653, would be revoked. Defendant would then be sentenced to consecutive terms of 5-20 years' imprisonment on the underlying drug charge and 1-4 years' imprisonment on the escape charge.

At the sentencing hearing in October, 1998, defendant moved to withdraw his guilty pleas and moved for a substitution of counsel. The trial court denied his requests and sentenced defendant pursuant to the terms of the plea agreement. The court revoked defendant's lifetime probation in the instant case and waived the eight-month jail sentence which had previously been imposed as a condition on defendant's probation. The court then sentenced defendant to consecutive prison terms of 5-20 years' imprisonment on the underlying drug offense and 1-4 years' imprisonment for escape. There is no indication in the trial court record that the court revoked defendant's sentence of lifetime probation in case #92-002653.

Defendant appealed his conviction and sentence to this Court. His appellate counsel argued that the trial court abused its discretion in failing to allow defendant to withdraw his guilty plea, because "defendant did not understand the enormity of his actions, in tendering a guilty plea." In a separate brief filed without the assistance of appellate counsel, defendant argued that his guilty plea was rendered involuntary because the eight-month jail term which the trial court added as a condition on his lifetime probation violated the state and federal Ex Post Facto clauses. Defendant argued that his escape from this unconstitutional incarceration could not form the basis for a conviction of either felony jail escape or probation violation. Because defendant did not know that his eight-month jail term was unconstitutional at the time he pleaded guilty to probation violation and escape, he argues that his guilty plea was therefore rendered involuntary. Finally, defendant argued that his plea was rendered involuntary because the sentencing court failed to revoke defendant's sentence of lifetime probation in case #92-002653, therefore depriving defendant of the benefit of his plea agreement.

This Court initially affirmed defendant's conviction and sentence, concluding that no Ex Post Facto violation occurred because the eight-month jail term was not a condition of probation, but rather a sentence for the first probation violation.<sup>2</sup> We subsequently granted defendant's motion for rehearing<sup>3</sup> in order to address the following issues. Although we now hold that defendant's eight-month sentence did violate the Ex Post Facto Clauses of the United States and Michigan Constitutions, we nevertheless affirm defendant's 5-20 year sentence.

## II. Ex Post Facto Clauses.

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<sup>2</sup> *People v Bowdidge*, unpublished opinion per curiam of the Court of Appeals, issued November 2, 1999 (Docket No. 215580).

<sup>3</sup> *People v Bowdidge*, unpublished order of the Court of Appeals, entered January 20, 2000 (Docket No. 215580).

Defendant first argues that his guilty plea on the probation violation and escape charges was involuntary because the incarceration from which he escaped was unconstitutional. Defendant contends that the condition of an eight-month jail term that was placed on his lifetime probation violated the Ex Post Facto Clauses of the United States and Michigan Constitutions. US Const, art I, § 9; Const 1963, art 1, § 10. We review questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). We agree that the eight-month jail term violated the state and federal Ex Post Facto clauses, but do not agree that such a violation renders defendant's guilty pleas involuntary.

Michigan law permits a trial court to impose a sentence of lifetime probation if a defendant is convicted of certain drug crimes. MCL 771.1; MSA 28.1131 provides, in pertinent part:

(1) In all prosecutions for felonies or misdemeanors other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses not described in subsection (4), if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

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(4) The sentencing judge may place a defendant on life probation pursuant to subsection (1) if the defendant is convicted for a violation of section 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code.

As noted above, defendant was sentenced to lifetime probation after pleading guilty to possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Under MCR 771.1(4); MSA 28.1131(4), defendant's initial sentence of lifetime probation was proper.

We must next consider whether the eight-month term of imprisonment, imposed as a condition on defendant's probation, was also proper. As a general matter, trial courts may impose conditions on a probation sentence, including imprisonment in the county jail for less than twelve months. MCL 771.3(2); MSA 28.1133(2) provides:

As a condition of probation, the court may require the probationer to do 1 or more of the following:

(a) Be imprisoned in the county jail for not more than 12 months, at the time or intervals, which may be consecutive or nonconsecutive, within the probation as the court determines. However, the period of confinement shall not exceed the maximum period of imprisonment provided for the offense charged if the

maximum period is less than 12 months. . . . The court may permit a work or school release from jail.

However, when defendant committed the underlying drug offense, an exception to that general rule existed for sentences of lifetime probation. MCL 771.3(3); MSA 28.1133(3) then provided:

Subsection (2) does not apply to a person placed on probation for life pursuant to sections 1(4) and 2(3) of this chapter.

On January 10, 1994, the Legislature enacted the present version of § 771.3(3), which states:

Subsection (2) may be applied to a person who is placed on probation for life pursuant to sections 1(4) and 2(3) of this chapter for the first 5 years of that probation.

Therefore, at the time of defendant's underlying drug conviction, the trial court was not permitted to impose a term of imprisonment in the county jail as a condition of defendant's lifetime probation. That penalty became available as a punishment approximately 1-½ years after defendant committed the underlying drug offense.

Defendant first contends that the eight-month jail term imposed for his first probation violation constituted a sentence on the underlying drug conviction that revoked his lifetime probation. In the alternative, defendant argues that the eight-month jail term constituted an invalid condition on his lifetime probation, in violation of the Ex Post Facto Clause. If this Court decides that the former is correct, then defendant contends that his 5-20 year sentence for probation violation is invalid because he could not have violated a probation which had already been revoked. If this Court decides that the latter is correct, then defendant contends that the 5-20 year sentence must be revoked by this Court as a violation of the state and federal Ex Post Facto provisions.

The record indicates that the trial court intended defendant's eight-month jail term to be a condition on his lifetime probation pursuant to § 771.3(3), and not a sentence for defendant's underlying drug conviction. At the sentencing hearing, the trial court referred to the sentencing guidelines for the underlying offense and noted that the guidelines range was "no less than 12 nor more than 30 months." Thus, it appears that the sentencing court contemplated revoking defendant's lifetime probation and sentencing him for the underlying offense pursuant to MCL 771.4; MSA 28.1134, which provides, in pertinent part:

If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.

Under that provision, the trial court could have sentenced defendant to a term of 1-20 years' imprisonment. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). However, the trial court decided that it was "not going to revoke probation." Instead, the trial court sentenced

defendant to an eight-month jail term with work release privileges. The court stated that “[p]robation . . . continues in all respects, other than the additional condition being added.” The sentencing court’s comments clearly indicate that the eight-month jail term with work release was intended to be a condition of defendant’s lifetime probation under § 771.3(2). If the current language of § 771.3(3) were applicable, the condition would have been valid because it was imposed within the first five years of defendant’s probation. MCL 771.3(3); MSA 28.1133(3). However, because the current language of § 771.3(3) was enacted approximately 1 ½ years after defendant committed the crime for which he was sentenced to lifetime probation, application of that statutory section in defendant’s case was erroneous.

In *People v Moon*, 125 Mich App 773, 776; 337 NW2d 293 (1983), this Court explained the conditions under which a statute will be considered invalid under the Ex Post Facto Clauses of the United States and Michigan Constitutions:

A statute which affects the prosecution or disposition of criminal cases involving crimes committed prior to the effective date of the statute violates the Ex Post Facto Clauses if it: 1) makes punishable that which was not; 2) makes an act a more serious criminal offense; 3) increases the punishment; or 4) allows the prosecution to convict on less evidence.

Defendant was charged with the underlying offense of possession with intent to deliver less than fifty grams of cocaine on July 13, 1992. The relevant revision of § 771.3(3) took immediate effect after the enactment of 1993 PA 343, on January 10, 1994. Thus, it is clear that defendant’s crime was committed before the enactment of revised § 771.3(3).

We conclude that the sentencing court’s imposition of a condition on defendant’s lifetime probation violated the Ex Post Facto Clauses because it increased his punishment. The relevant facts of the present case are similar to those of *Moon, supra*. As a condition of his probation, the defendant in *Moon* received a jail term that was twice as long as had been permissible under the statutory language in effect on the date of his crime. *Id.* at 775-776. This Court found that the defendant’s sentence constituted an impermissible increase in punishment under the Ex Post Facto Clauses. *Id.* at 780. In the present case, defendant received an eight-month jail term as a condition of his lifetime probation, when no jail term was permissible under the statutory language in effect on the date of defendant’s crime. Thus, according to our holding in *Moon*, we find that the sentencing court in this case violated the Ex Post Facto Clauses when it imposed the condition of an eight-month jail term on defendant’s lifetime probation pursuant to revised § 771.3(3).

### III. Defendant’s Sentence Remains Valid.

We conclude that defendant’s 5-20 year sentence for probation violation<sup>4</sup> is nevertheless valid, regardless of whether defendant’s eight-month jail term constituted a violation of the Ex

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<sup>4</sup> Defendant separately filed an application for leave to appeal from his conviction and sentence for felony prison escape, in case #224014. This Court denied defendant leave to appeal from that  
(continued...)

Post Facto Clauses. At the sentencing hearing at which the 5-20 year sentence was imposed, the trial court stated:

It is apparent that as to the offense of delivery of less than 50 grams of cocaine for which the Defendant was on life-time probation that continued supervision is absolutely inappropriate and that the Defendant has exhibited a course of conduct which rather amply demonstrates his rejection of the extreme privilege of the Sentence of life-time probation.

The trial court then revoked defendant's lifetime probation and sentenced him to 5-20 years' imprisonment pursuant to MCL 771.4; MSA 28.1134. While defendant was erroneously given an eight-month jail term as a condition of his lifetime probation, that error does not preclude the trial court from subsequently revoking defendant's lifetime probation and sentencing him for the underlying offense. Defendant violated his probation by fleeing to Georgia while on work release from the eight-month jail term. While the jail term may have been unconstitutional, defendant's flight to Georgia nonetheless constituted a clear violation of his probation. There is no indication that the trial court considered defendant's commission of the crime of escape when it sentenced defendant to 5-20 years' imprisonment. The sentence was imposed because defendant "demonstrate[d] his rejection of the extreme privilege" of lifetime probation by fleeing to another state. Thus, the fact that defendant escaped during the unconstitutional eight-month jail term is immaterial with regard to the issue of whether the 5-20 year prison term was proper. We affirm defendant's conviction and sentence for probation violation.

#### IV. Defendant's Plea Agreement.

Defendant next argues that the sentencing court abused its discretion by denying his motion to withdraw his guilty plea because he did not understand the consequences of his guilty plea. We disagree.

We review a trial court's decision not to permit a defendant to withdraw his or her guilty plea for an abuse of discretion. *People v Thew*, 201 Mich App 78, 81; 506 NW2d 547 (1993). "There is no absolute right to withdraw a guilty plea after a trial court has accepted it." *People v Kennebrew*, 220 Mich App 601, 605; 560 NW2d 354 (1996). A court may permit a defendant to withdraw his or her guilty plea before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance thereon. MCR 6.310(B). Essentially, the defendant has the initial burden of establishing a fair and just reason for withdrawing the plea. *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). Once a defendant sustains that burden, the prosecutor must demonstrate that "substantial prejudice would result from allowing the defendant to withdraw the plea." *Id.* at 611-612.

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(...continued)

plea-based conviction, and defendant's application for leave to appeal is currently pending before our Supreme Court. Because defendant's conviction and sentence for prison escape is not currently before us, we do not consider that issue.

At the plea hearing, the trial court advised defendant of the rights he was waiving by entering the pleas. In response to questioning by the court, defendant testified that he had neither been coerced into entering the pleas, nor promised anything off the record in return for the pleas. Defendant never expressed confusion about the plea process, nor did he indicate that he did not wish to plead guilty. The record does not support defendant's assertion that his pleas were ill-advised and that he did not understand the consequences of entering the pleas. Defendant has not met his burden of establishing a fair and just reason for withdrawal of the pleas. MCR 6.310(B); *Jackson, supra*.

Defendant next argues that the sentencing court abused its discretion by denying his motion to withdraw his guilty plea because he did not receive the benefit of the plea agreement reached with the prosecutor. We disagree.<sup>5</sup>

It is clear from the record that the plea agreement provided that defendant's sentences of lifetime probation in both the instant case and in case #92-002653 were to be revoked. It is also clear from the record that the trial court intended to sentence defendant pursuant to that agreement. However, there is nothing in the record indicating whether defendant's sentence of lifetime probation in case #92-002653 was actually revoked. Because it is clear that this revocation was part of the plea agreement in the present case and part of the trial court's intended sentence, we remand this case and order that defendant's sentence of lifetime probation in case #92-002653 be revoked pursuant to the previously articulated sentence of the lower court. Because this action will be purely ministerial, defendant is not entitled to resentencing. *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997). Because the record shows that the sentencing court intended to give defendant every benefit of his plea agreement with the probation department, the court did not breach that agreement or abuse its discretion by denying defendant's motion to withdraw his guilty pleas.

Defendant's convictions and sentence are affirmed and this case is remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ Brian K. Zahra  
/s/ Jeffrey G. Collins

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<sup>5</sup> In our order granting defendant's motion for rehearing, we ordered the prosecutor to file a supplemental brief addressing this issue. While the prosecutor filed a supplemental brief, she inexplicably failed to address this issue within that brief.